

The Ratepayer Advocate recommends that the Commission differentiate between the mass market⁴⁵ and the enterprise market⁴⁶ by simply classifying the lines provisioned at a DS0 level as mass market lines, and classifying the lines provisioned at DS1 and above as enterprise market lines.⁴⁷ Regarding mass market customers, the Ratepayer Advocate further recommends that the Commission determine whether CLECs are serving the entire business market, or only a portion of the market. For example, if CLECs are only serving customers with four or more lines, they should not be considered a direct competitor to the ILEC.⁴⁸

45/ The Commission has stated:

Mass market customers consist of residential customers and very small business customers. Mass market customers typically purchase ordinary switched voice service (Plain Old Telephone Service or POTS) and a few vertical features. Some customers also purchase additional lines and/or high speed data services. Although the cost of serving each customer is low relative to the other customer classes, the low levels of revenue that customers tend to generate create tight profit margins in serving them. The tight profit margins, and the price sensitivity of these customers, force service providers to keep per customer costs at a minimum. Profits in serving these customers are very sensitive to administrative, marketing, advertising, and customer care costs. These customers usually resist signing term contracts. *Triennial Review Order* at para. 127 (internal citations omitted).

46/ The Commission has stated:

Small and medium enterprises are willing to pay higher prices for telecommunications services than the mass market. Indeed, they are often required to do so under business tariffs. Because their ability to do business may depend on their telecommunications networks, they are typically very sensitive to reliability and quality of service issues. These customers buy larger packages of services than do mass market customers, and are willing to sign term contracts. These packages may include POTS, data, call routing, and customized billing, among other services. Although serving these customers is more costly than mass market customers, the facts that enterprise customers generate higher revenues, and are more sensitive to the quality of service, generally allow for higher profit margins. The higher profit margins and greater emphasis on quality of service can provide a greater incentive to competing carriers to provision their own facilities, and the higher revenues make it easier to cover the fixed costs of installing such facilities. *Triennial Review Order* at para. 128.

47/ See Baldwin Affidavit at para.27.

48/ On May 18, 2004, Verizon NJ provided New Jersey CLECs with notice that after August 23, 2004, it would no longer provide them with unbundled switching to serve enterprise customers subject to the Commission's four-line carve-out rule. The New Jersey Board of Public Utilities ultimately issued a "stand still" Order directing Verizon NJ to continue provision of the elements. Verizon NJ appealed this decision to the United States District Court, District of New Jersey on September 14, 2004 (Civ. Action No. 04-4438-WHW).

The *Triennial Review NPRM* sought comment on how to take geography into account in the Commission's unbundling analysis and what kinds of "geographic delineations would be useful" to such an analysis.⁴⁹ The Ratepayer Advocate contends that the unbundling framework should be applied at the wire center level, which is the appropriate geographic market to use in assessing impairment. The wire center is the logical choice because it reveals where customers are actually being served. The wire center also corresponds with the economics of supply and demand for retail and wholesale services, is administratively feasible, and recognizes disparate customer densities.⁵⁰ Verizon NJ, however, advocated the use of MSAs to define the relevant markets for the purposes of impairment. Verizon NJ initially described the purported benefits of using MSAs, and then stated that the Board could choose to use density zones within the MSAs.⁵¹ The Newark and Camden MSAs include wire centers with density zone classifications of 1, 2, or 3.⁵² Under the "alternative" proposal, Verizon NJ seeks a finding of non-impairment only for those wire centers classified in density zones 1 and 2.⁵³ Verizon NJ, however, fails to address or to provide any compelling evidence as to why it excludes zone 3 territory and why it contends there is no impairment in zones 1 and 2. The Ratepayer Advocate submits that Verizon NJ's proposed use of MSAs to define geographic markets for the purpose of the Commission's impairment analysis is vague and unsupported by witnesses in the state proceedings.⁵⁴

49/ Triennial Review NPRM, para. 39.

50/ See Baldwin Affidavit at paras. 29-30.

51/ Id. at 11-14.

52/ Three density zones exist for pricing UNE loops in New Jersey. *Wholesale Loop Costs*, Summary Order of Approval, New Jersey Board of Public Utilities Docket No. TO00060356, December 17, 2001, Attachment A.

53/ *I/M/O Implementation of the Federal Communications Commission Triennial Review Order*: New Jersey Board of Public Utilities Docket No. TO03040705, Verizon NJ response to RPA-TRO-93.

54/ For instance, the New Jersey Ratepayer Advocate propounded several discovery requests seeking the basis on which one of Verizon NJ's witnesses concluded that CLECs will seek to serve customers *throughout* an MSA. The responses indicated that his conclusion was based on general economic theory and that, in fact, CLECs may not seek to serve all portions of the market (i.e., MSA). See *I/M/O Implementation of the Federal Communications Commission Triennial Review Order*: New Jersey Board of Public Utilities Docket No. TO03040705, Verizon NJ's responses to RPA-TRO-132 through RPA-TRO-137.

The Ratepayer Advocate further contends that CLECs are impaired in a given geographic market unless and until CLECs serve both residential and business customers. CLECs must serve both residential and business customers to be considered serving the entire mass market. The Commission should continue to be guided by its analysis in the *Triennial Review Order* regarding the distinctions in customer class within the mass market in which it stated that, “[i]n circumstances where switch providers (or the resellers that rely on them) are identified as currently serving, or capable of serving, only part of the market, the state commission may choose to consider defining that portion of the market as a separate market for purposes of its analysis.”⁵⁵ Furthermore, the residential and small business market differ for several reasons, which means that, for the purpose of analysis, the Commission should consider separately whether the relevant markets are actually served. As illustrated in the attached Affidavit, the residential market is a distinct customer class within the mass market and the fact that Verizon NJ charges different rates for residential and business local exchange is evidence of separate markets.⁵⁶ It is therefore essential to examine whether mass market customers are being served in both the residential and business sub-markets. Moreover, the Commission should examine the degree to which CLECs serve the entire mass market.⁵⁷

^{55/} *TRO*, fn. 1552. The *Triennial Review Order Errata* does not change the wording of this fn., although it does change the sentence to which this footnote refers, *i.e.*, the sixth sentence.

^{56/} Attachment SMB-3 of the Baldwin Affidavit also demonstrates that price discrimination differentiates areas within Verizon NJ’s proposed geographic markets. This geographically-based price discrimination undermines the validity of Verizon NJ’s proposed, excessively broad geographic areas.

^{57/} See Baldwin Affidavit at para. 103.

H. THE ELIMINATION OF LINE-SHARING REQUIREMENTS WARRANTS RECONSIDERATION.

The Ratepayer Advocate also urges the FCC to revisit its decision eliminating line sharing as part of its *Triennial Review Order*. Line sharing promotes increased competition and fulfillment of the goals of the Act. Although the FCC did not request comment and input on this issue as part of the subject NPRM, the Ratepayer Advocate submits the FCC should revisit its handling of line sharing as part of this proceeding.

III. CONCLUSION.

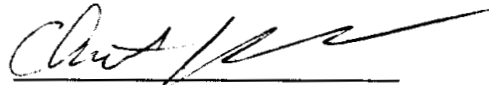
WHEREFORE the reasons set forth above and in the Affidavit, the Ratepayer Advocate submits the following recommendations to the Commission:

- final rules should promote competition and preserve the intent of the 1996 Act;
- the Commission should rely upon consistent and comparable data;
- Section 271 obligations are still binding and appropriate, and state commissions have authority to set intrastate rates;
- a rational transition period should be created;
- New Jersey granular data evidences that CLECs are impaired without access to UNE-P;
- the FCC should exercise forbearance authority and eliminate the necessary and impair standard in those relevant markets where the self-provisioning trigger is not met;
- the wire center is the appropriate relevant market and CLECs must serve both residential and business customers in the relevant market, and
- the elimination of line-sharing requirements warrants reconsideration.

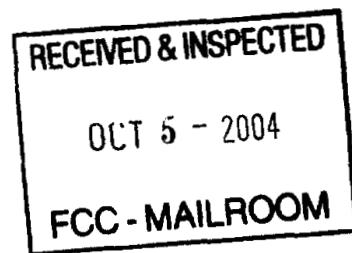
Respectfully submitted,

SEEMA M. SINGH, Esq.
RATEPAYER ADVOCATE

By:

A handwritten signature in black ink, appearing to read "Chris J. White", written over a horizontal line.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
)	
Review of the Section 251 Unbundling)	WC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**AFFIDAVIT OF
SUSAN M. BALDWIN**

on behalf of the

New Jersey Division of the Ratepayer Advocate

September 30, 2004

REDACTED – FOR PUBLIC INSPECTION

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I. INTRODUCTION

1. My name is Susan M. Baldwin. I am an independent consultant, and my business address is 17 Arlington Street, Newburyport, Massachusetts, 01950. I provide consulting services to public sector agencies on telecommunications economics, regulation, and public policy. My statement of qualifications is included as Attachment SMB-1.

2. I submitted testimony on February 2, 2004, on behalf of the New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") in New Jersey Board of Public Utilities Docket No. TO03090705, which addressed impairment for mass market unbundled switching, high capacity loops, and transport. I also provided technical assistance to the Ratepayer Advocate in the "hot cut" portion of the same proceeding.

3. I also prepared testimony in two other jurisdictions which analyzed the mass market switching impairment filings submitted by incumbent local exchange carriers ("ILECs"). In Arkansas, on behalf of the Office of the Attorney General, I analyzed the filing submitted by SBC Communications Inc. ("SBC") in Arkansas Public Service Commission Docket No. 03-

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171-U.¹ On behalf of the Utah Committee of Consumer Services, I analyzed the filing submitted by Qwest Corporation ("Qwest") in Utah Public Service Commission Docket No. 03-999-4.²

4. As a result of preparing comprehensive testimony regarding the impairment filings submitted by Verizon New Jersey ("Verizon NJ"), SBC Arkansas, and Qwest, and analyzing the competitively sensitive data submitted by those ILECs and competitive local exchange carriers ("CLECs") in three states, I acquired an in-depth familiarity with granular local telecommunications data, specific to various product, geographic, and customer class markets. Based on my first-hand knowledge of this detailed market-specific information, I applied the standards and rules set forth by the Federal Communications Commission ("FCC" or

¹*In the Matter of the Implementation of the Impairment Review Mandated by the Federal Communications Commission in its Triennial UNE Review*, Arkansas Public Service Commission Docket No. 03-171-U. I analyzed SBC's filing of February 2004, in which SBC sought a finding of non-impairment for mass market unbundled voice grade switching in the Little Rock LATA. I was asked to file testimony analyzing whether SBC's filing satisfied the triggers set forth by the FCC in its *Triennial Review Order* and addressing the implications of the proceeding for consumers in Arkansas. My testimony, although complete, was not filed as a result of the ruling by the U.S. Court of Appeals for the District of Columbia in *USTA v. FCC* vacating the FCC's delegation of authority. 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), *pets. for cert.* filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004). See also *United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the Court's mandate through June 15, 2004) ("USTA II Stay Order"). The USTA II mandate issued on June 16, 2004.

²*In the Matter of a Proceeding to Respond to the Federal Communications Commission Triennial Review Order Released August 21, 2003*, Utah Public Service Commission Docket No. 03-999-04. On behalf of the Committee of Consumer Services, I analyzed Qwest Communications Inc.'s claim of non-impairment in Utah markets, performed a "trigger analysis," and addressed the implications of the proceeding for consumers in Utah. My testimony, although complete, was not filed as a result of the Appeals Court remand.

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“Commission”) in its *Triennial Review Order*³ in order to determine whether and where impairment exists.

Purposes of Affidavit

5. The Ratepayer Advocate asked me to prepare this Affidavit to supplement and to provide further factual support for its comments in the instant proceeding. One of the purposes of this Affidavit is to “highlight[] factual information that would be relevant under the guidance of *USTA II*” and to provide, to the extent permitted by the proprietary agreements governing the New Jersey proceeding, the “underlying data, analysis and methodologies necessary to enable the Commission and commenters to evaluate the factual claims meaningfully, including a discussion of the basis upon which data were included or excluded.”⁴ In this Affidavit, I refer to, and to the extent permissible (as constrained by proprietary agreements that govern the treatment of data in the state proceeding), summarize data specific to local markets in New Jersey.

³*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“Triennial Review Order”), corrected by Errata, 18 FCC Rcd 19020, 19021, paras. 12-13, 15, 17 (2003) (“Triennial Review Order Errata”), vacated and remanded in part, affirmed in part, *USTA II*, 359 F.3d 554.

⁴*In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, released August 20, 2004 (“NPRM”), ¶ 15.

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6. Other purposes of this Affidavit are to address how to: (1) define relevant product, geographic and customer class markets;⁵ (2) establish transition mechanisms that “would help to prevent service disruptions during cut-overs from unbundled network element (“UNE”) facilities to a carrier’s own (or third-party) facilities, or for conversions to tariffed or other service arrangements”;⁶ and (3) apply the FCC’s unbundling framework “to make determinations on access to individual network elements.”⁷ This Affidavit provides specific recommendations regarding how the FCC should modify its unbundling framework to respond to the concerns raised by *USTA II* and also to eliminate ambiguity that now exists in the network unbundling rules.

7. This Affidavit summarizes how the FCC should apply its network unbundling framework to New Jersey markets, and more generally how the FCC should apply its framework to local markets. The recommendations in this Affidavit seek to improve the prospect of local competition for residential and small business mass market customers and to minimize the potential for service disruption when consumers migrate from one telecommunications supplier to a competing supplier.

The industry’s unique access to proprietary data should not prevent consumer advocates from making informed assessments of impairment in local markets.

⁵*NPRM*, ¶ 9.

⁶*NPRM*, ¶ 10.

⁷*Id.*, ¶ 11.

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8. Pursuant to the proprietary agreement in New Jersey's impairment proceeding and the FCC's confidentiality requirements, I am providing two versions of my Affidavit, which relies extensively on proprietary data that I examined in the Board of Public Utilities' ("Board") impairment proceeding. In the public version of my Affidavit (and the referenced attachments), I have redacted information that has been designated as confidential in New Jersey's impairment proceeding.⁸ In the confidential version of my Affidavit (and the referenced attachments), I include proprietary information, which is intended to assist the FCC with its granular analysis of relevant markets in New Jersey.

9. Should any of the industry participants, whether ILECs or CLECs, submit proprietary data in either their initial or reply comments in this proceeding, the Commission should afford other parties, particularly regulatory and consumer advocacy agencies (participants with the greatest potential for unbiased review of such data), ample opportunity to review these data and to propound discovery as necessary to obtain the data in the granular fashion necessary to assess impairment. In New Jersey, although Verizon NJ submitted some market data with its filing, the Ratepayer Advocate, Staff, and other parties to the proceeding nevertheless issued numerous data requests to Verizon NJ and to CLECs. The data that local exchange carriers provided in response to these information requests were essential to my ability to analyze relevant markets.

⁸The Board instructed parties to BPU Docket No. TO03090705 to work out the appropriate arrangements to use proprietary data in their filings with the FCC. The Ratepayer Advocate has informed me that the appropriate arrangements have been made to enable me to include data deemed to be proprietary.

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10. Based on my participation in three state proceedings in which state regulators were investigating ILECs' impairment claims, I believe that it is highly unlikely that any ILEC, in a submission to the FCC, will submit data that is sufficiently granular to permit a sufficiently informed assessment by the Commission of the merits of the filing. Analysis of CLECs' granular data is necessary in order to assess where self-provisioning CLECs are *actually* serving residential and small business consumers. For these reasons, discovery opportunities are essential to an impartial and adequately informed consideration of where and whether impairment exists in ILEC-dominated local markets.

11. Accordingly, as a threshold matter, the FCC should first assess whether it has sufficient access to granular data about local markets to make an informed determination regarding impairment. Then, the FCC should consider whether participants to the proceeding have had adequate opportunity to review such data, and to seek clarification and/or further disaggregation of such data from ILECs and CLECs. Without these two steps, the FCC cannot fulfill the directives of the 1996 Act⁹ or of *USTA II*. Furthermore, residential and small business consumers, who cannot themselves supply these allegedly proprietary data, should not be harmed by a process which lacks adequate information. Based on my review of proprietary data in New Jersey, I urge the Commission to find that impairment exists for mass market local switching in New Jersey.

⁹Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

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12. I understand that the Commission is eager to establish unbundling rules and to provide some regulatory certainty and stability.¹⁰ Although I share this objective, the pursuit of this objective should not come at the expense of consumers. Any ILEC that seeks a finding of non-impairment should make a concerted and good-faith effort to submit a comprehensively documented filing in a timely manner, and to respond to discovery requests expeditiously and completely. Similarly, any CLECs that oppose any particular ILEC filing should be obligated to submit similarly granular data for the markets in question, and, in the absence of such CLEC cooperation, the Commission should afford such opposition the weight that the unsupported opposition merits.

¹⁰*NPRM*, ¶ 16.

II. BACKGROUND

13. The FCC seeks comment on how it might amend its interpretation of “impairment” as that term is used in section 251(d)(2)(B) of the 1996 Act, and also on how it should apply various factors when it determines whether an ILEC must provide particular unbundled network elements to competitors.¹¹ The Court, in its *USTA II* decision, determined, *inter alia*, that the FCC had unlawfully delegated certain authority to states in the determination of whether impairment exists in particular markets. It is my understanding that the FCC now seeks to “reclaim” that authority, and, in so doing, to issue final network unbundling rules that respond to the concerns expressed in *USTA II*. Furthermore, it is my understanding that the FCC must now, informed in part by states’ proceedings through the various submissions in the instant proceeding, must review and evaluate ILECs’ specific claims of non-impairment in particular markets. Where the FCC lacks the relevant information to make such determinations, and/or if the FCC determines that the information in the instant proceeding is stale, then I would expect the FCC to issue data requests to the industry to obtain the necessary granular evidence necessary to make informed decisions.

The FCC’s resolution of this proceeding will affect consumers’ choices and the type of local competition that will occur.

14. At the broadest level, the outcome of this proceeding will affect whether and where economically sustainable local competition can develop. The investigation raises significant

¹¹NPRM.

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economic, market structure, and public policy issues, the resolution of which directly affects consumers' choices and the extent to which local competition can occur. Local competition is precarious. In reaching this conclusion, I have examined, among other information, the following data regarding New Jersey's local markets:

- UNE loops in service by wire center.
- UNE-P disconnects on a statewide basis for the period spanning January 2001-October 2003.¹²
- UNE loops previously cut over to CLECs, which were subsequently cut back to Verizon NJ switches for service by Verizon NJ.¹³

15. These granular data provide a critical context for examining the economic and market structure issues that this proceeding raises, anchoring the Commission's review of Verizon NJ's filing with important market structure information. Some of the findings that are relevant to this proceeding are:

- CLECs' position in the local market is tenuous: The number of UNE loops that were originally cut over to CLECs, but then subsequently cut back to Verizon NJ ("win-backs") has <<<**BEGIN PROPRIETARY** >>>**END**

¹²Data regarding disconnections of UNE loops are unavailable on a wire center "without a special study." Verizon NJ response to RPA-TRO-58.

¹³Verizon NJ response to RPA-TRO-70.

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PROPRIETARY over a one-year period. In 2002, customers that had been served through competitors' UNE loops "swung back" <<<**BEGIN PROPRIETARY**
END PROPRIETARY>>> to Verizon NJ. In 2003, during the ten-month period between January and October, customers swung back <<<**BEGIN PROPRIETARY**
END PROPRIETARY **END PROPRIETARY**>>> to Verizon NJ, an amount, which if annualized, would be <<<**BEGIN PROPRIETARY**
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- The number of *disconnections* of residential UNE-P in each of the years 2001, 2002, and 2003 (through October), were < < < **BEGIN PROPRIETARY**

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- As of June 2003, Verizon NJ supplied < < < **BEGIN PROPRIETARY**
END PROPRIETARY > > > UNE-P statewide to residential end users, < < < **BEGIN PROPRIETARY** **END PROPRIETARY** > > > UNE-P to business end users, and < < < **BEGIN PROPRIETARY** **END PROPRIETARY** > > > UNE loops throughout the state.¹⁶

¹⁴Verizon NJ response to RPA-TRO-70.

¹⁵Verizon NJ response to RPA-TRO-58.

¹⁶Verizon NJ responses to RPA-TRO-55 and RPA-TRO-57.

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These data demonstrate the volatility within the industry and the vulnerability of CLECs to churn and to regulatory uncertainty during this nascent period.

16. Despite the efforts of state and federal regulators to eliminate market barriers, successful entry to ILEC-dominated markets is not easy and requires CLECs to overcome (1) customer inertia, (2) economic and operational impediments, and (3) more than a century of Verizon NJ's dominance in New Jersey's local markets. Based on the FCC's statistics, Verizon NJ dominates the vast majority of the local market either directly through its own retail services or indirectly by leasing its wholesale facilities to its competitors (*i.e.*, the non-facilities-based competition that occurs through resale, UNE-P, and UNE loop).¹⁷ Even if viewed solely on a retail basis (which would be misleading because it would mask CLECs' reliance on the incumbent carrier's facilities), Verizon NJ dominates 81 percent of New Jersey's local markets.¹⁸

The changes in the local market since February 2004 have diminished the prospects for residential and small business competition.

17. I submitted my testimony to the New Jersey Board in February 2004. In the intervening eight months, the prospect of competitive choice among suppliers of basic local

¹⁷CLECs owned fewer than 92,000 out of the total 6.5-million end-user switched access lines in service in New Jersey as of December 31, 2003. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis Division, *Local Telephone Competition: Status as of December 31, 2003*, (June 2004), at Table 10: "CLEC-Reported End-User Switched Access Lines by State (as of December 31, 2003)."

¹⁸*Id.*, at Table 6: "End-User Switched Access Lines Served by Reporting Local Exchange Carriers (As of December 31, 2003)."

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telecommunications services for mass market consumers has suffered serious setbacks. AT&T announced plans to stop marketing its residential telephone service.¹⁹ One article characterized the decision in this manner:

AT&T's move is a potential windfall for the Bells . . . which have been increasingly successful in selling packages of local and long distance. Mr. Dorman said AT&T's decision to withdraw was clinched by a recent regulatory setback that will make it more expensive for AT&T and others to rent the Bells' lines to sell similar packages. MCI Inc. and Sprint Corp. also have throttled back on advertising and marketing.²⁰

Press reports indicate that both AT&T and MCI are for sale, given the right deal.²¹ Many of the smaller competitors are also scaling back marketing and expansion plans.²² Although ILECs may tout Voice over Internet Protocol ("VoIP") as gaining consumer appeal, as I discuss in Section IV, this technology does not yet represent an economic substitute for basic local exchange service.

¹⁹Four months ago, AT&T announced its plan to pull out of seven states. "AT&T: No New Home Customers in 7 States," Reuters, June 23, 2004, http://news.yahoo.com/news?tmpl=story&u=/nm/20040623/bs_nm/telecoms_att_local_dc

²⁰"AT&T Posts 80% Drop in Net, Confirms Consumer Retreat," *The Wall Street Journal*, July 23, 2004, page A11.

²¹"Bride or Bridesmaid? AT&T and MCI May Compete for Suitors," *The Wall Street Journal*, August 2, 2004, page C1.

²²"Without rules in place that support vibrant competition in the telecommunications marketplace, competitive carriers and consumers are now unfortunately faced with great uncertainty," said Donald Davis, Z-Tel's senior vice president-industry policy, in the June 21 letters. "The victims of this dramatic shift in federal policy and the resulting uncertainty will be consumers." "Z-Tel to Cease New Residential Business in Eight States," *TR Daily*, June 22, 2004.

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18. The approximate eight-month passage of time between my preparation of testimony in New Jersey BPU Docket No. TO03090705 and my preparation of this Affidavit potentially raises two concerns. However, as I explain below, *neither of these concerns undermine or alter my conclusion that Verizon NJ has failed to demonstrate that there are *any* areas in New Jersey within which the elimination of unbundled mass market switching would not impair CLECs.*

19. The first concern is simply that, with each passing day, CLECs' may enter and exit markets, may gain or lose customers, and may shift their mode of entry. Conceivably, over an eight-month period, the competitive landscape could have changed materially. In order to assess generally the impact of the passage of time on the local market structure, I compared publicly available FCC-provided local competition data for June 2003 (the most recent FCC data available when I submitted my testimony) and for December 2003 (the most recent FCC data available when I prepared this Affidavit). As Table 1 below shows, New Jersey CLECs slightly increased the use of their own lines to serve customers (mass market and enterprise), with a rise of approximately 3 percent. In sharp contrast, during the same time period, New Jersey CLECs' use of UNEs – UNE-Platform (“UNE-P”) and UNE-Loop (“UNE-L”) – to serve customers increased by approximately 26 percent, with an approximate 28 percent increase in their use of UNE-P and only a 2 percent increase in their use of UNE-L. Clearly, the availability of UNEs, especially UNE-P, is essential to CLECs' efforts to establish themselves in the competitive marketplace, and to mass market consumers' opportunities for competitive choice.

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Table 1
Consumer Choice Depends on UNEs, Particularly UNE-P

New Jersey	June 2003	December 2003	Growth
CLEC-owned	88,858	91,922	3 %
UNE Loops	63,168	64,423	2 %
UNE Platform	697,936	892,997	28%
Total UNEs	761,140	957,420	26%
Resold Lines	239,113	219,548	-8%
Total CLEC Retail Lines	1,089,075	1,268,890	17%
Verizon NJ Retail Lines	5,389,747	5,231,266	-3%
CLEC Share of Total	17%	20%	
Total US	June 2003	December 2003	Growth
CLEC-owned	6,275,655	6,935,358	11%
UNE Loops	4,205,000	4,260,000	1%
UNE Platform	13,026,000	15,161,000	16%
Total UNEs	17,231,000	19,421,000	13%
Resold Lines	4,887,321	4,726,260	-3%
Total CLEC Retail Lines	28,393,976	31,082,618	9%
ILEC Retail Lines	155,922,118	151,837,752	-3%
CLEC Share of Total	15%	17%	

Sources: *Local Telephone Competition: Status as of June 30, 2003 and December 31, 2003*, Industry and Analysis Division, Wireline Competition Bureau, Tables 3, 4, 7, and 10. *RBOC Local Telephone Data as of December 2003 and June 2003*. The total UNEs shown are the calculated totals of the quantities shown for UNE-L and UNE-P; these values differ slightly from the total UNEs reported in the *Local Telephone Competition* reports.

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20. The second concern regarding the passage of time since I submitted testimony in New Jersey is that, in the intervening months, the Court issued *USTA II*, and the FCC issued the instant *NPRM*. As discussed above, these major regulatory decisions are motivating CLECs' re-assessments of their business plans, which, in turn, will lead to changes in data about CLECs' presence in particular markets. The FCC's next release of local competition data (in December 2004 for data effective through June 30, 2004) may incorporate some of this effect. However, in my view, these regulatory events will only further dampen local competition, and, for this reason, do not alter my assessment that mass market switching impairment exists throughout New Jersey. If, however, the FCC considers it essential to review data that post-dates at least the *USTA II* decision, this data-gathering route would further justify the FCC holding evidentiary hearings to allow all parties comparable access to data.

21. Until recent data are made available, I cannot fully assess the impact of *USTA II* on CLECs' deployment decisions. ILECs are quick to assert that the availability of UNE-P (at prices they contend are too low) discourages CLECs from deploying their own switches. For example, in Utah's impairment proceeding, a Qwest witness stated that "[u]nnecessary unbundling requirements reduce the incentives of entrants and incumbents alike to invest and innovate." The witness further asserted:

If UNE-P resale is available in markets where it is not necessary for entry, carriers will have a strong incentive to avoid the risk of investing in their own networks to compete against each other. Incumbents will similarly be less inclined to invest and

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innovate if the benefits of their doing so will be reaped (cheaply) by their competitors.²³

An alternative view, to which I ascribe, is that the availability of UNE-P, set at cost-based rates, provides accurate pricing signals, which in turn leads to economically efficient investment and avoids wasteful duplication of resources.²⁴ If, contrary to my belief, ILECs are correct, then one would expect, in the wake of the sobering Court decision, a surge of CLEC interest in deploying UNE loops. If, on the other hand, we observe a decline in UNE-P demand without an offsetting increase in UNE loops, the ILECs' assertion that UNE-P is a "crutch" will lose even more credibility. In this instance, consumers will be harmed because UNE-P – as both a stepping stone and alternative to facilities-based competition – will not be able to realize its potential as a catalyst in offering residential and small business customers choice among suppliers. Instead of migrating from UNE-P to UNE-L (or to entirely facilities-based deployment), CLECs may exit the mass market entirely. Furthermore, unless and until ILECs provide empirical evidence demonstrating that CLECs use UNE loops to serve *residential* customers, *the loss of UNE-P disproportionately harms residential customers.*

²³Direct testimony of William Fitzsimmons on behalf of Qwest Corporation, January 13, 2004, Utah Public Service Commission Docket No. 03-999-04, at 15.

²⁴A recent study shows that "states that have established relatively lower rates for unbundled loop access have enjoyed *more* consumer choice and have seen *more* deployment of broadband technology within their borders." "The Positive Effects of Unbundling on Broadband Deployment," Phoenix Center Policy Paper No. 19, George S. Ford and Lawrence J. Spiwak, Phoenix Center Policy Center, September 2004, at 12 (emphasis in original).